

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matters of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provisions of	)	
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

**REPLY COMMENTS OF AT&T INC. IN SUPPORT OF VERIZON’S PETITION  
FOR LIMITED RECONSIDERATION AND IN OPPOSITION TO ARIZONA’S  
PETITION FOR CLARIFICATION AND/OR RECONSIDERATION  
OF THE TITLE I BROADBAND ORDER**

AT&T Inc. (“AT&T”) submits these reply comments in support of Verizon’s Petition for Limited Reconsideration and in opposition to the Arizona Corporation Commission’s Petition for Clarification and/or Reconsideration of Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, WC Docket Nos. 02-33 *et al.* (released September 23, 2005) (“*Title I Broadband Order*”).

**ARGUMENT**

The facts that compel the relief sought in Verizon’s Petition are not seriously disputed. No party disputes that the purchasers of ATM, Frame Relay, Gigabit Ethernet, and newer IP-enabled broadband transmission services are typically sophisticated customers that prefer individualized contracts and unique configurations of services and terms tailored to the specific circumstances of their businesses. Nor does any party dispute the Commission’s findings that many suppliers compete fiercely in the provision of these services. As AT&T and others have

shown, given the nature of these services and the marketplace in which they are provided, the public interest would undeniably be served by making clear that all providers of all such services have the *option* of making private arrangements tailored to individual customers' specific needs. In the *Title I Broadband Order*, the Commission made just such a finding for broadband transmission services when they are used for Internet access, and no commenter has offered a reasoned explanation why those same findings should not apply to other broadband transmission services that, if anything, are even more inherently customized and even more competitive than wireline broadband Internet access services.

Instead of engaging on these core issues, the various opponents of Verizon's Petition raise meritless procedural objections, misstate the relevant legal tests for when common carriage is compelled, and reflexively trot out old hobbyhorses from other proceedings that have no relevance here. They claim that Verizon's Petition goes beyond the proper scope of the proceeding; that as a matter of law the fact that these services are competitive is irrelevant and that all providers are forever stuck with the historical practice of offering these services on a common carrier basis; and that enterprise customers should continue to be denied the benefits of customized arrangements for broadband transmission services because of alleged incumbent LEC market power in the provision of special access services. None of these objections withstands scrutiny, and none should delay granting Verizon's Petition.

1. Broadwing claims (at 1-3) that Verizon's Petition goes beyond the scope of this proceeding, which is allegedly limited to services used for Internet access. To the contrary, the Notice expressly asked the parties to comment on the correct classification of services that "provide[] only broadband transmission on a stand-alone basis, without a broadband Internet access service," to "address what the appropriate statutory classification of broadband

transmission should be when it is not coupled with the Internet access component,” and to discuss “the circumstances under which owners of transmission facilities offer broadband transmission on a private carrier basis.” NPRM ¶ 26. In direct response to these requests for comment, Verizon and others made extensive showings that *all* providers should have the option of offering any broadband transmission service on a private carriage basis, and those showings generated significant debate in the pleadings and *ex partes*. Although the Commission chose to limit its September 2005 order to broadband transmission used for Internet access, *see* Broadwing at 2; XO at 3-4, the original Notice, and the proceeding as a whole, clearly encompass the issues raised by Verizon’s Petition.

Indeed, the Commission’s decision to recognize a private carriage option for broadband transmission services insofar as they are used for Internet access *necessarily* raises the question whether the same regulatory treatment must be accorded to such services when they are used for other purposes. As Verizon’s Petition explains, and contrary to XO’s assertion (at 3), the Commission did not adequately explain in the *Title I Broadband Order* why stand-alone broadband transmission may be offered on a private carriage basis when it will be used for Internet access but not when it is used for other purposes – especially when the record gathered in response to the Commission’s Notice abundantly demonstrates that broadband transmission services are customizable and subject to competitive forces in both situations.<sup>1</sup> The Notice, and the parties’ responsive submissions, squarely raised the question whether the Commission could

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<sup>1</sup> In the passages quoted by XO (at 3), the Commission explained only why certain stand-alone broadband transmission services (as opposed to wireline broadband Internet access services offered to end-user consumers) might not be considered information services. Those passages do *not* explain why the determination of whether a stripped-out stand-alone broadband transmission service should be subject to a private carriage option could rationally turn on whether the transmission service is used for Internet access.

arbitrarily limit its relief to Internet access services, and the Commission's order does not respond to those showings beyond bare statements that the order will be so limited.<sup>2</sup>

2. The comments of CompTel, XO, and Time Warner all reflect serious confusion about when mandated common carriage requirements are appropriate and why the competitiveness of the relevant services necessarily informs such determinations. CompTel argues that the fact that carriers such as Verizon offer broadband transmission services as common carrier services *today* is itself dispositive – in other words, once a common carrier service, always a common carrier service. As CompTel sees it, the “legal compulsion” aspect of the *NARUC* common carriage test does not even apply to services “that have already been deployed,” and it asserts that it is not even proper to inquire whether common carrier regulation remains necessary to address ongoing market power. CompTel at 8-9 & n.20.

This completely misstates the relevant legal test. Under the applicable precedents, there is a presumption that a provider *may* offer a service on a private carriage basis, unless the provider chooses to offer the service on a common carrier basis or there is a “legal compulsion” to do so. *See, e.g., NARUC v. FCC*, 525 F.2d 630, 641-642 (D.C. Cir. 1976). As the Commission and the courts have recognized, a “legal compulsion” to offer service on a common carrier basis is justified only where it is abundantly clear that market forces do not give service providers adequate incentives to offer commercially reasonable terms.<sup>3</sup> The Commission's

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<sup>2</sup> Earthlink's argument (at 1-2) that the Petition is procedurally “defective” under 47 C.F.R. § 1.429 is frivolous; Verizon has identified a material error in the order, and the Commission did *not* consider the parties' arguments and evidence on these issues in the Order, but rather limited its consideration to Internet access without explanation.

<sup>3</sup> *See, e.g., Computer & Communications Indus. Assoc. v. FCC*, 693 F.2d 198, 208-09 (D.C. Cir. 1982); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (“the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances”); *AT&T Submarine Systems, Inc.*, 13 FCC Rcd. 21585, ¶ 9 (1998).

assessment of market forces can – indeed, must – change over time as circumstances change. Thus, where appropriate, the Commission certainly has the authority to recognize a private carriage option even where common carriage was mandatory before – as indeed it did in the *Title I Broadband Order* itself. See *Title I Broadband Order* ¶¶ 86-88. But as the cases make clear, the Commission’s authority to continue existing compulsory common carriage turns on the very evidence of marketplace competition that CompTel claims is irrelevant and thus refuses to address.

And there is no question that carriers provide many of the broadband transmission services at issue here on a common carrier basis in the face of legal compulsion – as CompTel itself concedes. See CompTel at 12 n.29 (citing *Frame Relay Order*, 10 FCC Rcd. 13717 (1995)).<sup>4</sup> For these reasons, CompTel’s and XO’s contention that Verizon has not adequately proven that it *already* offers the relevant services on a private carriage basis reflects a complete misunderstanding of the law and the Petition. See CompTel at 10; XO at 4. Verizon’s Petition seeks a private carriage *option* where, because of a current legal compulsion, that option is not currently available. The fact that carriers provide these services today as common carriage carries no weight in the analysis; what is relevant is the fact that customers demand customized solutions, and there are no marketplace concerns that could justify a Commission decision to frustrate the preferences of carriers and their customers by continuing to mandate common carriage.

Time Warner takes a completely different tack and argues that the Commission cannot permit private carriage unless common carrier alternatives remain. That, too, is wrong. Neither

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<sup>4</sup> Indeed, under CompTel’s view of *NARUC*, it is not clear why the Petition is necessary at all – if the legal compulsion prong is irrelevant, and if firms provide these services as common carrier services today solely by choice, presumably they could simply choose to provide them as private carriage going forward. See CompTel at 12.

the Commission nor the courts have ever held that the existence of common carrier alternatives is necessary to a finding of private carriage, and there have been a number of instances in which the Commission has recognized a private carriage option in the absence of common carrier alternatives for the same services – including the *Title I Broadband Order* itself. *See also, e.g., CCIA v. FCC*, 693 F.2d at 208-09 (enhanced services); *Southwestern Bell Tel Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (dark fiber).

3. Finally, a few commenters claim that there are legitimate market power concerns that require the Commission to continue mandatory common carriage obligations. Those claims are also entirely misguided. Indeed, these commenters do little more than reflexively repeat arguments they have made in other contexts, with hardly any attempt to explain how those arguments are relevant to Verizon’s Petition. In discussing special access in particular, these commenters make broad claims that indiscriminately lump a number of disparate services together. *See, e.g.,* Time Warner at 4-8; Broadwing at 7-11; Earthlink at 3-4. It is important to disaggregate these various claims.

First, the Commission has consistently recognized for years that the services at the core of Verizon’s Petition for a private carriage option – *e.g.,* ATM, Frame Relay, Gigabit Ethernet service, and other more advanced IP-enabled broadband transmission services – are fiercely competitive.<sup>5</sup> Just recently, the Commission concluded in its SBC-AT&T and Verizon-MCI merger orders that competition for “high-capacity transmission services,” including Frame

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<sup>5</sup> *See, e.g., MCI-WorldCom Merger Order*, 13 FCC Rcd. 18025, ¶¶ 34, 40-42, 65; 73 & n.230 (1998); *see also Bell Atlantic-GTE Merger Order*, 15 FCC Rcd. 14032, ¶¶ 120-21 (2000); *SBC-Ameritech Merger Order*, 14 FCC Rcd. 14712, ¶¶ 89-90 (1999); *AT&T-TCG Merger Order* ¶¶ 28, 37, 40.

Relay, ATM, and Gigabit Ethernet is “robust.”<sup>6</sup> No party makes any attempt to show that the provision of these services is anything other than intensely competitive.

And the only special access services for which the Petition expressly seeks a private carriage option are optical (“OCn”) special access services. Petition at 2 n.3. There is no doubt that these services are subject to effective competition. In its recent *Triennial Review Remand Order*, the Commission found that the revenue opportunities associated with OCn-level special access services were comfortably above the level that would justify self-deployment, and that no carrier would be impaired in its ability to offer service without unbundled access to OCn-level loops anywhere in the country. Those findings are now conclusive: no party has appealed the Commission’s findings with respect to OCn-level loops, and indeed, these very commenters conceded that they could self-deploy OCn-level loops in the *Triennial Review* proceeding. *See, e.g., Unbundled Access to Network Elements*, WC Docket No. 04-313, Comments of Time Warner Telecom at 18 (October 4, 2004) (requesting unbundled access to DS1 and DS3 loops); *see also* Time Warner at 7 n.15 (quoting commenters in *Triennial Review*, including XO, conceding feasibility of self-deployment of optical services). Accordingly, there are no competitive concerns that would justify the continuation of mandatory common carriage for such services, nor is there any possibility that any provider could use OCn-level special access services (or other high-capacity optical services such as AT&T’s DecaMAN service) to harm consumers of those services or to execute a successful “price squeeze” for any other service that uses these optical services as an input.

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<sup>6</sup> *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order ¶¶ 57, 73 n.223 (released November 17, 2005) (“*SBC-AT&T Merger Order*”); *see also Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, ¶ 74 (released November 17, 2005) (“*Verizon-MCI Merger Order*”).

The Petition's opponents are therefore left with the claim that incumbent LECs could price packet-based DS1 and DS3 services at wholesale to execute a price squeeze in the downstream markets for which there would be a private carriage option. *See* Time Warner at 4-5, 7-8, 11 n.24; *see also* Broadwing at 11. These concerns are grossly overblown and should not delay granting Verizon's Petition. As the Commission recently found in the *SBC-AT&T Merger Order*, there are already regulatory protections in place to guard against such a possibility: unbundled access to DS1 and DS3 loops is available in areas where competitors cannot readily build their own, and price caps for such services remain in place in many areas. *SBC-AT&T Merger Order* ¶ 55 ("where UNEs are available, they provide an alternative for special access service" and "[f]or areas where UNEs are not available . . . competing carriers have invested heavily" in "local facilities").<sup>7</sup> The Commission is currently investigating whether regulation of these special access services should be modified, *see Special Access NRPM*, 20 FCC Rcd. 1994 (2005), and any legitimate concerns about regulation of wholesale inputs are appropriately addressed directly in that pending rulemaking. *See, e.g., SBC-AT&T Merger Order* ¶ 55. The answer to any such concerns is not to impose unwarranted tariffing and other regulations on retail broadband services that could only increase costs and reduce broadband competition and innovation. The Commission has consistently found the downstream retail markets at issue are robustly competitive, and, as the Commission concluded in the *Title I Broadband Order*, deregulatory measures that provide substantial public interest benefits should not be delayed in order to wait for an ideal of perfect competition at other levels. *See Title I Broadband Order* ¶¶

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<sup>7</sup> AT&T in particular is also subject to a number of merger commitments relating to special access. *See* SBC-AT&T Merger Order, Appendix F. AT&T will of course abide by these commitments, and, contrary to Earthlink's claims (at 4), there is nothing about a Commission finding that carriers have an option of private carriage that would require AT&T to violate any of these commitments. Indeed, the commitments do not even apply to most of the services at issue in Verizon's Petition.

56, 59, 63 (“predictive judgment” that broadband Internet access competition, while currently still somewhat limited, would continue to develop); *see also Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (common carrier determination must focus only on “the particular practice under surveillance”).<sup>8</sup>

## CONCLUSION

For the foregoing reasons, the Commission should grant Verizon’s petition and allow all wireline carriers, in their discretion, to make individualized offerings of wireline broadband transport services. The Commission should also modify or repeal any *Computer Inquiries* or other existing requirements that would operate to deny any carrier such pro-consumer and pro-competitive flexibility.

Respectfully submitted,

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<sup>8</sup> Because the services covered by Verizon’s Petition are all robustly competitive and the economics of such services support self-deployment of the necessary facilities, Time Warner’s claim that a private carriage option would deprive providers of the ability to offer broadband Ethernet transmission services is also meritless. *See Time Warner* at 19-20.